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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

444

No. .....

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF THE ROBERTSON LUMBER COMPANY, a Corporation,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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CONTINENTAL CASUALTY COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The United States of America, for the Use and Benefit of The Robertson Lumber Company, a corporation, the petitioner herein, prays that a writ of certiorari issue to

review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 30, 1962.

OPINIONS BELOW.

The United States Court of Appeals for the Eighth Circuit entered its opinion and judgment on the 30th day of June, 1962, as reported in ... F. 2d ..., and is found in Appendix A. The opinion of the Court of Appeals for the Eighth Circuit was rendered on appeal from a memorandum decision of the United States District Court for the District of North Dakota, Northeastern Division, dated May 24, 1961, shown in the Record (p. 7), and from a summary judgment entered by said United States District Court on September 14, 1961, which decision is reported at 196 F. Supp. 171, and is printed in the Record (p. 8).

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 30, 1962 (Appendix A). The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C., § 1254 (1), and suit was originally brought in the United States District Court for the District of North Dakota, Northeastern Division, under the Miller Act, 40 U. S. C., § 270 (49 Stat. 794, Aug. 24, 1935, c. 642).

QUESTION PRESENTED AND STATEMENT OF THE CASE.

In August, 1958, the Defendant, Progressive Contractors, Inc. (hereinafter referred to as Progressive), the United States Air Force and certain Delaware Housing Corporations (hereinafter referred to as the Delawares), entered into a contract whereby the Defendant, Progressive Con-

tractors, Inc., agreed to build certain housing units (on certain property on the Grand Forks Air Force Base leased to the Delawares) which would be owned by the Delawares but were to be used exclusively by the Air Force (Record pp. 13 through 30). This contract known as Capehart Project Grand Forks 744 was entered into pursuant to Title IV of the Housing Amendments of 1955, as amended, commonly referred to as the Capehart Housing Program (Title 42, U. S. C. A., § 1594) and the contract by its terms required that Progressive furnish a bond (Record p. 16). This bond (in a form prepared by the Government) was furnished with Continental Casualty Company (hereinafter referred to as Continental) one of the endorsing sureties and is known as F. H. A. Form No. 2452 C. P. Payment Bond—Dual—Obligee (the bond is found on p. 10 of the Record).

On May 20, 1960, Progressive abandoned the project, defaulted on the contract and failed to pay numerous labor and material suppliers. One of the several material suppliers that had such a claim was the use Plaintiff, Robertson Lumber Company (hereinafter referred to as Robertson).

On December 10, 1960, Robertson instituted an action in United States District Court against Progressive and Continental claiming certain sums were due it from Progressive and its surety Continental and that it was entitled to recover from the Defendant, Continental, by virtue of the provisions of the so-called Miller Act [Title 40, U. S. C. A., § 270a and § 270b (a) and (b)] (see Record p. 2).

Continental answered and issue was joined (Record pp. 3 and 4) and after a pre-trial conference it was determined that the principal defense of Consolidated was that the use Plaintiff, Robertson, had not complied with the terms of the bond as to dual notice and therefore under the terms of the bond (Record p. 12) could not maintain

an action against Continental. The use Plaintiff, Robertson, admitted that it had not complied with the terms of the bond as to dual notice (Record p. 5) but it contended that that failure was immaterial as the Miller Act had no such notice requirements and that as it had done all that was required under the Miller Act [Title 40, U. S. C. A., §§ 270a and 270b (a) and (b)] it was entitled to recover under the bond (Record p. 6). It was admitted by Continental that the necessary Miller Act notice had been given (Record p. 5).

Based on a stipulated question as follows, the matter was argued to the United States District Court for the District of North Dakota, Northwestern Division, without a jury:

> "The question of law involved is whether or not the procedures used by the use-plaintiff, which satisfy the requirements of the Miller Act are sufficient to give a right of recovery under the bond" (Record p. 6).

In its memorandum decision (Record p. 7) the District Court found for petitioner on the above stipulated question of law. Petitioner then moved for Summary Judgment, all of the facts having been stipulated or admitted, and the motion was granted and Summary Judgment for the petitioner entered in the amount of $13,780.08 (Record p. 8).

On Appeal, the United States Court of Appeals for the Eighth Circuit, reversed the judgment of the District Court and ordered a dismissal of the complaint holding that the provisions of the Miller Act did not apply to suits brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act.

STATUTES INVOLVED.

The statutes involved in this proceeding are U. S. Code, Title 40, Sec. 270 (49 Stat. 794) (Miller Act) (see Appendix D), and U. S. Code, Title 42, Sec. 1594 (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109) (Capehart Act) (see Appendix E).

REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals for the Eighth Circuit (Record p. 27) is in conflict with the **Morris W. Lasley et al. v. U. S. A. for the Use of C. C. Westerman**, 285 F. 2d 98, decided by the Court of Appeals for the Fifth Circuit (see Appendix C).

The opinion of the Court of Appeals for the Eighth Circuit in this matter (Record p. 34) states as follows:

> "We find ourselves unable to agree with the **Westerman** case and the other decisions cited by the District Court and relied upon by Appellee."

It may be argued that the Westerman decision involved the specific question of jurisdiction only. However, it is important to note that this opinion stated "that the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U. S. C. A., § 270b (b), quoted above, and that the remainder of the provisions of the Miller Act would apply to the Capehart bond just as they do to a Miller Act Bond." The procedural requirements of the Miller Act are one of the remaining provisions of the Miller Act and therefore the notice under the Miller Act should apply to the Capehart bond.

There are numerous other decisions in the United States District Courts that hold that the Miller Act applies to

Capehart housing construction. **R. L. Autrey et al., v. Williams and Dunlap et al.,** 185 F. Supp. 802; **U. S. A. for the Use of Acme Furnace Fitting Co. v. Ft. George Meade Defense Housing Corporation No. 1 et al.,** 186 F. Supp. 639.

It is contended that the decision of the Court of Appeals for the Eighth Circuit fails to support the great weight of authority that the Miller Act should be liberally construed so as to protect materialmen. The weight of authority further shows that the liability of the surety must be co-extensive with that of the contractor and that the purpose of the procedural notice of the Miller Act is to protect the prime contractor, not the surety. The cases also show that the Miller Act was adopted for the purpose of replacing the procedural difficulties of the Heard Act, and that where a bond is furnished in compliance with the Miller Act, but contains different terms, the rights against the surety must nevertheless be measured by the terms of the Act. **U. S. A. for the Benefit of Harry Sherman et al. v. Donald G. Carter et al.,** 353 U. S. 210, 1 L. Ed. 2d 776, 77 S. Ct. 793; **U. S. A. for the Use and Benefit of Hopper Bros. Quarries, a Partnership, v. Peerless Casualty Company, a Corporation,** 255 F. 2d 137 (8th C. C. A.); **U. S. A. ex rel. for Use and Benefit of Korosh et al. v. Otis Williams & Co. et al.,** 30 F. Supp. 590; **Clifford F. MacEvoy Co. and The Aetna Casualty & Surety Co. v. U. S. A. for the Use and Benefit of the Calvin Tomkins Co.,** 322 U. S. 102, 88 L. Ed. 1163, 64 S. Ct. 890.

Petitioner is not unmindful of the recent decision in the Court of Appeals for the Tenth Circuit which appears to have decided the identical question as the Eighth Circuit, which also holds that the Miller Act does not apply to Capehart Housing. **U. S. A. for the Use and Benefit of Miles Lumber Company et al. v. Harrison and Grimshaw Construction Company et al.,** ... F. 2d ... (unreported as

of the time of this petition). Petitioner is also aware that a petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit has been filed on the October, 1962, Term of the U. S. Supreme Court. It is the intention of the petitioner to move for a consolidation of argument before the U. S. Supreme Court in the event certiorari is granted as the two actions concern identical problems. It is petitioner's contention that this decision of the Tenth Circuit also conflicts with the Fifth Circuit decision (Appendix C). The decision of the Tenth Circuit seems to be based primarily on the point that the Court determines Capehart construction to be a private work rather than a public work and therefore does not come under the terms of the Miller Act. The Fifth Circuit decision expressly comes to the conclusion that Capehart Housing is a public works.

Petitioner urges that the Court of Appeals for the Eighth, Tenth and Fifth Circuits have decided, in conflict, an important question of law which has not been, but should be, settled by this Court. Capehart Housing projects are in process or contemplated in many areas throughout the country wherever military construction is needed. Wherever there is military housing being built, numerous questions will arise. Until the question of the application of the Miller Act to Capehart Housing construction is definitely concluded, such rather unusual decisions will occur as that in the Supreme Court of the State of New Jersey in **Gypsum Contractors, Inc., v. American Surety Company of New York**, 37 N. J. 315, 181 A. 2d 174 (May 8, 1962), where the provisions of the Capehart bond specifically allowed an action to be brought in state courts, but the New Jersey Supreme Court refused to allow jurisdiction holding that the Miller Act applied to Capehart housing and the United States District Courts had exclusive jurisdiction to try actions under the Miller Act.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 16,912.

Continental Casualty Company, a Corporation, Appellant,

vs.

The United States of America for the Use and Benefit of the Robertson Lumber Company, a Corporation, Appellee.

Appeal from the United States District Court for the District of North Dakota.

(June 30, 1962.)

Before Van Oosterhout and Blackmun, Circuit Judges, and Henley, District Judge.

Henley, District Judge.

This litigation arose out of the construction of certain housing for military personnel stationed at the Grand Forks Air Force Base, Grand Forks, North Dakota, under the housing program authorized by the Capehart Housing Act, as amended.[1] Appellee, use plaintiff below, furnished materials to the prime contractor engaged in the construction of the housing and not being paid therefor commenced

[1] Act of August 11, 1955, Public Law 84-345, 69 Stat. 646 ff., as amended by Act of August 7, 1956, Public Law 84-1020, 70 Stat. 1110, 12 U. S. C. A., §§ 1748 ff. and 42 U. S. C. A., §§ 1592 ff.

this action against the prime contractor and one of the sureties on the contractor's statutory payment bond. The contractor did not defend the action. The issues between appellee and the surety were narrowed to a single question of law, and the District Court rendered summary judgment for appellee. **United States for the Use and Benefit of the Robertson Lumber Company v. Progressive Contractors, Inc. et al.**, D. C. N. Dak., 196 F. Supp. 171. This appeal followed.

The 1956 amendment to the Capehart Act provided that all contracts for Capehart housing "shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section."[2]

The bond in suit was executed on a form specifically prescribed by the contract for the construction of the housing, which form had been adopted by the Department of Defense and by the Federal Housing Commissioner. The bond contained certain provisions for notice to be given by laborers or materialmen as a condition precedent to action on the bond. Admittedly, appellee failed to give the notice required by the bond, and appellant pleaded this failure as a complete defense.

In meeting this defense appellee contended that the relationship between the Capehart Act and the Miller Act was such that a supplier of labor or materials to a Cape-

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[2] 42 U. S. C. A., § 1594. Section 270a of Title 40, U. S. C. A., referred to in the Capehart Act, as amended, is section 1 of the Miller Act which requires the giving of performance and payment bonds by contractors engaged in the construction, alteration, or repair of any "public building or public work of the United States," where the amount of the contract exceeds $2,000.

hart housing contractor is entitled to all of the protection of the Miller Act, that the procedural provisions of the Miller Act (40 U. S. C. A., § 270b and c) extend to bonds executed under the Capehart Act, and that notice requirements inserted in a Capehart bond which are more stringent than the notice requirements of the Miller Act are invalid and are to be ignored. The notice provisions of the bond in suit are in fact more stringent than the notice requirements of the Miller Act, and appellee had met all of the requirements of that Act. Based on those premises appellee urged that the defense set up by appellant was without merit.

In attacking the judgment of the District Court appellant takes the position that although the Capehart Act refers to section 1 of the Miller Act, nevertheless a Capehart Act bond is not a Miller Act bond; that the Secretary of Defense or his designee has the power to prescribe the form and contents of a Capehart bond; that the form here used was prescribed by and satisfactory to the Department of Defense; that the notice provisions contained in the bond were valid, and that compliance therewith was a condition precedent to action on the bond.

Alternatively, appellant contends that even if the Secretary and the Federal Housing Commissioner had no right to insert in the bond notice requirements in excess of those contained in the Miller Act, nevertheless such requirements were in fact inserted, and that the liability of the surety should be measured by the terms of the instrument which it actually signed rather than by the terms of the Miller Act.

As is well known, the Miller Act, adopted in 1935, has for its purpose the protection of those who supply labor or materials for use in Government construction. **Fanderlik-Locke Co. v. United States for Use of M. G. Morgan,**

10 Cir., 285 F. 2d 939; **United States for Use of Hopper Brothers Quarries v. Peerless Casualty Co.**, 8 Cir., 255 F. 2d 137; **St. Paul-Mercury Indemnity Co. v. United States for Use of H. C. Jones**, 10 Cir., 238 F. 2d 917. The Act, which is to be construed liberally, is designed to give such suppliers the same protection that State lien laws give ordinarily to persons furnishing labor and materials for use in private construction; and since the property of the United States is not subject generally to State lien laws, the bond protection of the Miller Act is in lieu of the liens provided by State law. **United States for Use of Munroe-Langstroth, Inc. v. Praught**, 1 Cir., 270 F. 2d 235; **United States for Use of Gibson v. Harman**, 4 Cir., 192 F. 2d 999; **United States for Use of Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corporation**, D. C. Md., 186 F. Supp. 639; **United States for Use of James F. O'Neil Co. v. Malan Construction Corp.**, E. D. Tenn., 168 F. Supp. 255.

As far as notice is concerned a Miller Act supplier who deals directly with a prime contractor is not required to give any notice as a condition precedent to a suit on the bond, although presumably he will make demand for payment before commencing his suit. Where the supplier deals with a subcontractor, he is required to give notice to the prime if he expects to recover against the prime and the latter's surety, but in no event is a Miller Act supplier required to give notice to the surety before commencing suit or, in any event, to give notice to more than one person or entity. 40 U. S. C. A., § 270b (a).[3]

The purpose of the Capehart Act was to provide urgently needed housing for military personnel on Govern-

[3] The prescribed form of Capehart bond which appellant executed required "dual notice" as a condition precedent to suit on the bond. That is to say, a supplier of labor or materials was required to give notice to at least two of the parties to the bond, one of which parties might be the surety.

ment property, and while Capehart housing is undoubtedly "Government housing," Capehart construction differs from conventional Government construction in certain significant respects.

Ordinarily, federal public works are paid for both initially and finally with federal funds. Capehart housing, on the other hand, initially is built and financed by private capital, although loans made by financial institutions to finance the construction are fully insured by the Federal Housing Administration. Both the Department of Defense and the Federal Housing Administration are concerned with the administration of the Capehart program, and the Federal Housing Commissioner has been authorized to promulgate regulations concerning the program, 12 U. S. C. A., § 1748f, which authority has been exercised, see 24 C. F. R., Part 292a.

The Capehart Act now requires both payment and performance bonds, and standard forms of those bonds have been worked out by the Department of Defense and the Federal Housing Administration, and all Capehart housing contracts call for the giving of those particular bonds, as was done in this case.

With some allowance for possible oversimplification, a typical Capehart project may be described substantially as follows:

A building contractor desiring to build Capehart housing and who has been the successful bidder for such housing, and who has made satisfactory arrangements to secure private financing, forms a corporation to take a long term lease on the Government property on which the housing is to be constructed and to execute a mortgage on the leasehold estate to the financial institution which is to lend the money required for construction purposes. This corporation, which is at all times under complete Govern-

ment control, does not do the actual building of the housing units. That is done by the contractor under contract with the Government and with the corporation. The functions of the corporation are limited and to some extent nominal. It takes the lease and executes the mortgage and is a party to the construction contract. Further, it is one of the obligees named in the contractor's performance and payment bonds in the statute, regulations and contract documents the contractor is called the "eligible bidder;" the corporation is called the "mortgagor-builder," and the lending agency is called the "mortgagee."

As the project is completed, the housing units are turned over to and occupied by military personnel. Quarters allowances previously paid to such personnel are retained by the Government and used to pay off the mortgage. When the mortgage is finally retired, the lease to the "mortgagor-builder" is terminated, and that corporation is dissolved, leaving title to the housing in the Government.

The contractor derives his profit from doing the actual building of the housing. From the Government's standpoint, advantages are seen in that federal funds are not expended for initial construction, and while the housing will be paid for eventually with federal money, that money would have been expended in any event as quarters allowances for the affected service personnel. In addition, the program may be supposed to provide a stimulus for private industry and capital.

Having made the foregoing comments with regard to the Miller Act and the Capehart Act and the program contemplated by the latter Act, we return to the question for decision which is whether the notice provisions contained in the bond in suit were valid.

In holding those provisions invalid the District Court cited **Lasley v. United States for Use of C. C. Westerman,**

5 Cir., 285 F. 2d 98; **United States for Use of Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corporation**, supra; and **Autrey v. Williams & Dunlap**, W. D. La., 185 F. Supp. 802. Although none of those cases involved the validity of the notice provisions appearing in Capehart bonds,[4] it may be conceded that when those decisions are broadly read, they tend to support the District Court's decision in this case since they appear to proceed upon the theory that Capehart contractors and their sureties are subject to the procedural provisions of the Miller Act, including the notice provisions. This theory seems to be based on the premise that prior to the 1956 amendment to the Capehart Act, Capehart contractors were subject to all of the provisions of the Miller Act. From that premise it was reasoned that since the 1956 amendment modified only the prior existing substantive obligations of the contractors to furnish bonds meeting the requirements of 40 U. S. C. A., § 270a, the procedural provisions of the other sections of the Miller Act still apply to Capehart housing. See **Westerman**, supra, 285 F. 2d at 100.

We find ourselves unable to agree with the **Westerman** case and the other decisions cited by the District Court

[4] Specifically, the question before the courts in all of those cases was whether a Capehart supplier could sue in federal court by virtue of the grant of federal jurisdiction conferred by the Miller Act. 40 U. S. C. A., § 270b (b). That question was answered in the affirmative in all three cases. However, as was recognized in *Westerman*, another basis for federal jurisdiction of a suit on a Capehart bond is to be found in 28 U. S. C. A., § 1352 which provides that the State and the federal courts shall have concurrent jurisdiction with respect to all actions brought on any bonds required by "any law of the United States." A Capehart bond is clearly a bond required by a "law of the United States," hence, federal jurisdiction of a suit on such a bond is established without regard to any relationship between the Miller Act and the Capehart Act. The *Westerman* case was tried on its merits by the writer of this opinion while sitting by special assignment in the Western District of Texas. However, the jurisdictional question had been passed upon by one of the regular judges of the District.

and relied upon by appellee. Without necessarily quarreling with the **Westerman** premise that prior to 1956 Capehart contractors were required to furnish Miller Act bonds,[5] we are of the opinion that when Congress amended the Capehart Act in 1956 it recognized that Capehart housing is not conventional Government construction, that the private construction and financing of Capehart housing and the joint administration of the Capehart program by the Department of Defense and the Federal Housing Administration presented problems not encountered in ordinary Government construction, and that it intended, as far as bond protection for laborers and materialmen is concerned, to treat Capehart housing as *sui generis*. While we think that Congress intended that Capehart suppliers should have substantive bond protection essentially similar to that afforded Miller Act suppliers, we think also that Congress intended that the procedural provisions of Capehart bonds should be worked out and prescribed by the two agencies involved in the light of the unique nature of Capehart construction and of the peculiar problems which might be encountered in connection with such construction. In our estimation had Congress intended for the procedural provisions of the Miller Act to apply to Capehart contractors and their sureties it simply would have said so.

The interpretation which we place upon the 1956 amendment to the Act is in harmony with the administrative interpretation which has been placed upon it by the agencies charged with the implementation of the Capehart program. This is evidenced by the fact that the notice provisions in question, and certain other procedural provisions which differ from the procedural provisions of the Miller Act, were inserted in the bond forms by the agencies them-

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[5] We have seen no case in which the question was actually presented for adjudication.

selves. It is settled, of course, that in the case of an ambiguous statute, and the 1956 amendment is ambiguous, the interpretation placed upon it by the agencies charged with its enforcement is entitled to great weight.

It may be argued plausibly that there should be general uniformity in the procedure required to be followed by Capehart suppliers on the one hand and Miller Act suppliers on the other. But, bearing in mind the differences between Capehart housing and more familiar types of Government construction, we do not know that absolute procedural uniformity is practicable, just, or desirable. Presumably, the agencies had some valid reason for prescribing dual notice as a condition precedent to action on a Capehart bond, although the record before us does not establish affirmatively what that reason was.[6]

The view which we take of the case renders it unnecessary for us to pass upon appellant's alternative contention that in any event its liability must be measured by the terms of the bond as written regardless of whether those terms should have been inserted in the bond. While **United States for Use of W. B. Young Supply Co. v. Stewart**, 8 Cir., 288 Fed. 187, the principal case cited by appellant in support of its alternative position, may be distinguished from the instant case, and while other relevant authorities appear to be in conflict,[7] the alternative contention is by no means frivolous in the circumstances here present. But, be that as it may, it is to be remembered that the only sec-

[6] Whatever the reason for its existence, the requirement itself is neither unreasonable nor oppressive. There is no suggestion here that Capehart suppliers cannot inspect or obtain copies of Capehart bonds, and counsel for appellant stated without contradiction in the course of the argument that most of the suppliers of labor and materials for the Grand Forks project had in fact given the dual notice and had been paid.

[7] See 43 Am. Jur., Public Works & Contracts, § 147 and authorities there cited.

tion of the Miller Act referred to in the Capehart Act is the section which requires the giving of a bond; and when Congress said in the Capehart Act that the giving of a bond satisfactory to the Secretary of Defense or his designee should constitute compliance with the section of the Miller Act which requires that a bond be given, we think that the clear import of the language used was to take Capehart bonds entirely out of the Miller Act.

The judgment appealed from is reversed and this cause is remanded to the District Court with directions to dismiss the complaint.

Blackmun, Circuit Judge, concurring.

I concur, although somewhat hesitatingly. This case, I suspect, is a very close one. I fully appreciate the force of the plaintiff's position when it urges (a) the purpose of the Miller Act, namely, affording all suppliers a protection equivalent to that normally provided by state lien laws; (b) the liberal approach given the Miller Act (see, for example, **United States v. Aetna Casualty & Surety Co.**, 2 Cir., 1962, 297 F. 2d 665); (c) the *in pari materia* character of the Capehart and Miller Acts, and (d) the significance of the existing authorities, cited by the trial court and, in Judge Henley's opinion (to which might now be added **Gypsum Contractors, Inc., v. American Surety Co.**, N. J. Sup. Ct., May 7, 1962, 30 L. W. 2565), which, although concerned primarily with jurisdiction, at least inferentially lend support to the argument that the procedural provisions of the Miller Act are equally applicable to matters arising under the Capehart Act.

I am persuaded, however, by the agency practice; by the distinction between Capehart projects and other public works so far as direct use of government funds is concerned; by the apparently greater exposure to risk in Cape-

hart housing; by the feeling that the surety's obligation here should be measured by its contract, particularly where the rights of a non-party are concerned and where, as contrasted with the Miller Act, the statute is so unclear; by the absence of helpful material in the legislative history; and by the completely unexplained failure of this plaintiff to avoid his difficulty in the first instance by taking the small trouble to give the dual notice so clearly required by the bond.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

(Judgment.)

United States Court of Appeals
for the Eighth Circuit.

No. 16,912. September Term, 1961.

Continental Casualty Company, Appellant, vs. The United States of America for the Use and Benefit of the Robertson Lumber Company, a Corporation.	Appeal from the United States District Court for the District of North Dakota.

This Cause came on to be heard on the record from the United States District Court for the District of North Dakota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Continental Casualty Company, a Corporation, have and recover against the Robertson Lumber Company, a Corporation, the sum of Twenty-five and no/100 ($25.00) Dollars, Clerk's docketing fee in this Court, and the sum of One Hundred Forty-two and 10/100 ($142.10) Dollars, the cost of printing the record in this cause, making a total of One Hundred Sixty-seven and 10/100 ($167.10) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this Cause be, and it is hereby, remanded to the said District Court with directions to dismiss the Complaint.

June 30th, 1962.

APPENDIX C.

Opinion of the United States Court of Appeals, Fifth Circuit.

United States Court of Appeals,
Fifth Circuit.

No. 18544—December Term, 1960.

Rehearing Denied Jan. 31, 1961.

Morris W. Lasley, Doing Business as Lasley Construction Company et al., Appellants,

v.

United States of America, for the Use of C. C. Westerman, Appellee.

Tuttle, Chief Judge.

Appellee instituted this action under the provisions of the Miller Act, 40 U. S. C. A., §§ 270a-270d. His petition alleged that certain sums were due him as a subcontractor on a Capehart Housing Project located at Fort Bliss, Texas.

Appellants, defendants below, moved the district court to dismiss the suit on the ground that the court was without jurisdiction to hear the case. The court held that jurisdiction was conferred upon it by the Miller Act, and accordingly overruled the motion. The case was submitted to the jury upon special interrogatories and judgment was entered against appellants in the sum of $15,237.66. From that judgment this appeal is taken; we find that the only substantial question raised by appellants before this Court relates to the jurisdiction of the district court to entertain this suit.

Performance and payment bonds are required by the Miller Act "Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person." 40 U. S. C. A., § 270a. That statute further provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit * * *." 40 U. S. C. A., § 270b (b).

Similar bonds are required under the Capehart Act, which provides for the construction of housing facilities for military personnel. So far as construction contracts are concerned, that statute, in part, provides:

> "* * * Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and **the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section.** * * *." 42 U. S. C. A., § 1594 (a) (Emphasis supplied).

The gist of appellants' argument is that since the bonds in controversy were not executed pursuant to the Miller Act and since a similar jurisdictional provision is not contained in the Capehart Act, the district court did not have jurisdiction to hear the case, and, accordingly, appellants' motion to dismiss should not have been overruled, and, further, that no diversity jurisdiction could be had by the court since the essential parties to the suit were both citizens of New Mexico.

(1) Appellants' argument is plausible, but we are not persuaded by it. We think it clear that Congress considered that but for the provisions of the Capehart Act, quoted above, a contractor would be required to supply a builder with a Miller Act bond before entering upon a Capehart construction job, because such a project falls within the language "construction * * * of any public building or public work of the United States:" that the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U. S. C. A., § 270b (b), quoted above, and that the remainder of the provisions of the Miller Act would apply to the Capehart bond just as they do to a Miller Act bond. This would, of course, include the provisions conferring jurisdiction on the district courts of the United States.

(2) However, even assuming, arguendo, that this is not true, we find that the district court nevertheless had jurisdiction to entertain this suit under the concurrent jurisdiction conferred upon it by 28 U. S. C. A., §1352.[1] For this reason, there is no merit in the arguments put forth by appellants.

We consider the other points which appellants seek to raise before this Court to be without foundation, and the judgment of the district court should be and accordingly is

Affirmed.

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[1] "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States."

APPENDIX D.

Miller Act.

Title 40, U. S. C., § 270.

§ 270a. **Bonds of contractors for public buildings or works; waiver of covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000

the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

§ 270b. **Same; rights of persons furnishing labor or material.**

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last

of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug. 4, 1939, Pub. L. 86-135, § 1, 73 Stat. 279.

Secs. 270c, 270d, and 270e . . . (omitted as irrelevant to the issues).

APPENDIX E.

Capehart Act.

Title 42, U. S. C., § 1594.

SUBCHAPTER XI.—HOUSING FOR MILITARY PERSONNEL.

§ 1594. **Contracts for construction—Contract provisions; competitive bids.**

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no ad-

ditional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

Definition of "eligible bidder".

(b) For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

Acquisition of capital stock of property covered by mortgage.

(c) Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under sections 1748-1748g and 1748h-1 of Title 12, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to

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Because of the length of the Capehart Act, those sections or parts of sections of no importance to the issue have been omitted.

which they are assigned. Aug. 11, 1955, c. 783, Title IV, § 403, 69 Stat. 651; Aug. 7, 1956, c. 1029, Title V, §§ 506 (b)-(d), 507, 70 Stat. 1110.

Opinion as to title to property; guarantee; title search and title insurance.

(d) On request by the Secretary of Defense, the Attorney General shall furnish to the Secretary of Defense, or his designee, an opinion as to the sufficiency of title to any property on which it is proposed to construct housing, or on which housing has been constructed, under this section. If the opinion of the Attorney General is that the title to any such property is good and sufficient, the Secretary of Defense is authorized to guarantee, or enter into a commitment to guarantee, the mortgagee, under a mortgage on such property which is insured under sections 1748-1748i of Title 12, against any losses that may thereafter arise from adverse claims to title. None of the proceeds of any mortgage loan hereafter insured under such sections 1748-1748i of Title 12 shall be used for title search and title insurance: *Provided*. . . .

§ 1594a. **Acquisition of land or housing financed under Armed Services Housing Mortgage Insurance Fund—Purchase price.**

(a) Whenever the Secretary of Defense or his designee deems it necessary for the purpose of this subchapter, he may acquire, by purchase, donation, condemnation, or other means of transfer, any land or (with the approval of the Federal Housing Commissioner) (1) any housing financed with mortgages insured under sections 1748-1748g, 1748h-1 and 1748h-2 of Title 12 as in effect prior to August 11, 1955, or (2) any housing situated adjacent to a military installation which was (A) completed prior to July 1, 1952, (B) certified by the Department of Defense, prior to construction, as being necessary to meet an

existing military family housing need and considered as military housing by the Federal Housing Commissioner, and (C) financed with mortgages insured under section 1713 of Title 12. The purchase price of any such housing shall not exceed the Federal Housing Commissioner's estimate of the replacement cost of such housing and related property (not including the value of any improvements installed or constructed with appropriated funds) as of the date of final endorsement for mortgage insurance reduced by an appropriate allowance representing the estimated cost of repairs and replacements necessary to restore the property to sound physical condition, as determined by the Secretary of Defense or his designee upon the advice of the Commissioners: *Provided*, That in any case where the Secretary or his designee acquires a project held by the Commissioner, the price paid shall not exceed the face value of the debentures (plus accrued interest thereon) which the Commissioner issued in acquiring such project.

Housing at or near a military installation.

(b) Notwithstanding any provision of subsection (a) of this section to the contrary, the Secretary of Defense or his designee shall, in the manner provided in subsection (a) of this section, acquire by purchase, donation, or other means of transfer or, if the parties cannot agree upon terms for acquisition by such means, by condemnation, any housing described in clause (1) or (2) of subsection (a) of this section which is located at or near a military installation where the construction of housing under the Armed Services Housing Mortgage Insurance Program has been approved by the Secretary.

Condemnation; procedures; deposit; payment; interest.

(c) (1) . . .

Occupancy; use, or improvement of property before approval of title.

(d) Property acquired under this section may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 255 of Title 40.

Release of accrual requirements for replacement, taxes, and hazard insurance reserves.

(e) The Secretary or his designee may, in the case of any housing acquired or to be acquired under this section, make arrangements with the mortgagee whereby such mortgagee will agree to release and waive all requirements of accruals for reserves for replacement, taxes, and hazard insurance provided for under the corporate charter and indenture agreement with respect to such housing, upon the execution of a written agreement by the Secretary or his designee that the purpose for which such reserves and other funds were accrued will be carried out.

Use as public quarters or lease of housing; deposit of amounts and rental charges.

(f) Any housing acquired under this section may be (1) assigned as public quarters to military personnel and their dependents; or (2) leased to military and civilian personnel for occupancy by them and their dependents, upon such terms and conditions as will in the judgment of the Secretary of Defense or his designee be in the best interest of the United States, without loss to military personnel of their basic allowance for quarters or appropriate allotments. Amounts equal to the quarters allowances or appropriate allotments of military personnel to whom such housing is assigned as public quarters under clause (1), and the rental charges realized under clause (2), shall be deposited in the revolving fund created by subsection (g) of this section.

Creation of revolving fund; purpose; deposits.

(g) There is created a fund which shall be used by the Secretary of Defense or his designee as a revolving fund for the purpose of paying for housing and related property acquired under this section, paying interest, principal, mortgage insurance premiums, and other obligations (except those for maintenance and operation) with respect to such housing, and paying expenses incurred in the alteration, improvement, rehabilitation, and repair of such housing. The amounts and charges referred to in the last sentence of subsection (f) of this section, and any savings realized in the operation of section 1594b of this title, shall be deposited in such fund. For the purposes of the preceding sentence, the term "savings realized in the operation of section 1594b of this title" means the difference between the amount made available for payments under section 1594b of this title and the amount actually used in making such payments.

Capital for revolving fund.

(h) The Secretary of the Treasury is authorized and directed to establish on the books of the Treasury Department the revolving fund created pursuant to the authority of this section. To provide capital for such fund, there is authorized to be appropriated a sum not to exceed $50,000,000 and the Secretary of Defense, with the approval of the President, is authorized to transfer from unexpended balances of any appropriations of the military departments not carried to the surplus fund of the Treasury such sums as may be determined by the Secretary of Defense to be necessary to provide adequate capital for the revolving fund.. Aug. 11, 1955, c. 783, Title IV, § 404, 69 Stat. 652; Aug. 3, 1956, c. 939, Title IV, § 420, 70 Stat. 1019; Aug. 7, 1956, c. 1029, Title V, § 512, 70 Stat. 1111.

§ 1594b. **Maintenance and operation of housing; use of quarters; payment of principal, interest, and other obligations.**

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest, and other obligations, except those of maintenance and operation, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed $21,000,000 per month: *Provided*, That, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month. Aug. 11, 1955, c. 783, Title IV, § 405, 69 Stat. 652; Aug. 7, 1956, c. 1029, Title V, § 508, 70 Stat. 1110.

§ 1594c. **Services of architects and engineers; use of appropriations; acquisition of sites.**

Whenever the Secretary of Defense or his designee determines that it is desirable in order to effectuate the purposes of this subchapter, the Secretary is authorized, without regard to the civil service and classification laws, to procure, by negotiation or otherwise, the services of architects and engineers, or organizations thereof, under such arrangements as he deems desirable, but at an expense not in excess of that permissible under the schedule of fees allowed from time to time by the Public Housing Administration in connection with projects assisted under the United States Housing Act of 1937, as amended. Such services may include the development of plans, drawings,

and specifications for family housing under this title and other services in connection therewith: *Provided*, That such plans, drawings, and specifications may include the use on any project to be constructed under this subchapter of alternate materials or alternate types of construction, including prefabrication, that provide substantially equal value and conform to standards established by the Federal Housing Commissioner: *Provided, further*, That such plans, drawings, and specifications, when developed pursuant to arrangements made under this section after August 7, 1956, shall follow the principle of modular measure, in order that the housing may be built by conventional construction, on-site fabrication, factory precutting, factory fabrication, or any combination of these construction methods: *Provided further*, That the Secretary may designate certain sites or parts thereof for family housing to be furnished from prefabricated houses or housing components. Such arrangements may include provision for advance or progress payments, for payment by third parties, for payment by the Government of any such compensation as is not paid for by third parties, and shall include provision for reimbursement by third parties to the Government of any compensation or other expenses paid by the Government pursuant to this section, and may include other provisions for compensation. Any public works appropriations now or hereafter available to the Departments of the Army, Navy, or Air Force or the Coast Guard may be obligated by the respective departments or the Coast Guard for these purposes. Reimbursements to the Government on account of payments made pursuant to this section shall be made to appropriations against which such payments were charged. The Secretary is further authorized to advance or pay to the Federal Housing Administration its "Appraisal and Eligibility Statement" fees in connection with such family housing. The Secretary is further authorized to enter into

arrangements by contract or otherwise for eventual acquisition by the Government, without cost to the Government of all right, title, and interest in sites on which housing is constructed pursuant to this subchapter and improvements thereon. Aug. 11, 1955, c. 783, Title IV, § 406, 69 Stat. 653; Aug. 7, 1956, c. 1029, Title V, § 509, 70 Stat. 1110.

§ 1594d. **Appropriations; use of quarters allowances.**

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1594-1594c of this title.

(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section. Aug. 11, 1955, c. 783, Title IV, § 407, 69 Stat. 653.

§ 1594e. **Definitions**

§ 1594f. **Net floor area limitations.**

In the construction of housing under the authority of this subchapter and sections 1748-1748g and 1748h-1 of Title 12, the maximum limitations on net floor area for each unit shall be the same as the net floor area limitations prescribed by law (at the time plans and specifications for such construction are begun) for public quarters built with appropriated funds under military construction authority. As amended July 12, 1957, Pub. L. 85-104, Title V, § 503, 71 Stat. 303.

§ 1594h. **Purchase of family housing for assignment as public quarters; space and cost limitations.**

The Secretary of the Army is authorized to purchase out of appropriations available for military construction family

housing, including necessary land at, or near, military tactical installations for assignment as public quarters to military personnel and their dependents. Not more than 300 units of such housing may be purchased under this section. Space limitations per unit will be in accordance with subsections (a), (b) and (c) of section 4774 of Title 10, and cost limitations as now or hereafter established for military housing constructed with appropriated funds. Pub. L. 85-241, Title 1, § 103, Aug. 30, 1957, 71 Stat. 534.

§ 1594i. **Authorization of number of family housing units.**

Notwithstanding the provisions of any other law, and effective July 1, 1958, no family housing units shall be contracted for or acquired at or in support of military installations or activities unless the actual number of units involved has been specifically authorized by an annual military construction authorization Act except (1) housing units acquired pursuant to the provisions of section 1594a of this title; (2) rental guarantee family housing authorized under section 302 of the Act of July 14, 1952 (66 Stat. 606, 622): *Provided*, That not more than five thousand units shall be contracted for under the authority of such section prior to June 30, 1964, and (3) housing units leased for terms of one year, whether renewable or not, or for terms of not more than five years pursuant to the provisions of section 2675 of Title 10. Pub. L. 85-241, Title IV, § 406 (a), Aug. 30, 1957, 71 Stat. 556, amended Pub. L. 85-685, Title V, § 512, Aug. 20, 1958, 72 Stat. 662; Pub. L. 86-149, Title IV, § 408, Aug. 10, 1959, 73 Stat. 321; Pub. L. 86-500, Title V, § 507 (b), June 8, 1960, 74 Stat. 185; Pub. L. 87-70, Title VI, § 611 (b), June 30, 1961, 75 Stat. 180.

§ 1594j. **Inadequate quarters—Occupancy on rental basis without loss of basic allowance for quarters.**